

Appeal from a decision of the Eastern States Office, Bureau of Land Management, dismissing a protest of the survey of an island previously omitted from survey. ES 36151.

Affirmed.

1. Public Lands: Generally--Public Lands: Riparian Rights--Surveys of Public Lands: Omitted Lands

An island, whether located in navigable or nonnavigable waters, that is omitted from a survey remains public domain and may be surveyed and disposed of by the United States.

APPEARANCES: John G. Cameron, Esq., M. Gayle Robinson, Esq., Grand Rapids, Michigan, for appellants; Richard J. Woodstock, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Mr. and Mrs. Thomas J. Dekker have appealed from a decision dated January 7, 1987, by the Eastern States Office, Bureau of Land Management (BLM), dismissing their protest of BLM's determination that an unnamed island of approximately 2.5 acres in Island Lake, Grand Traverse County, Michigan, is public land. The island is described as Tract 37, sec. 31, T. 27 N., R. 9 W., Michigan Meridian. The island, designated as Tract 37 on BLM's plat of survey, is not shown on prior plats of survey of the township or mentioned in the field notes in earlier surveys. An 1839 survey determined the exterior boundaries and subdivisional lines of the township and an 1850 resurvey was directed to the subdivisional lines.

Instructions issued by the Surveyor General in 1850 for the States of Ohio, Indiana, and Michigan required deputy surveyors to meander "all lakes and deep ponds, of the area of forty acres and upwards; and all islands suitable for cultivation." C. Albert White, A History of the Rectangular Survey System 368 (emphasis supplied). Subsequent instructions in 1864 advised that survey of "small unsurveyed islands which were omitted when the adjacent lands were surveyed" was authorized if an applicant for survey paid the cost thereof; such islands are "usually of too little value to justify the Government in incurring the expense of survey." Id. at 503.

Current instructions set forth at section 3-122 of The Manual of Instructions for the Survey of the Public Lands of the United States (1973) provide:

Even though the United States has parted with its title to the adjoining mainland, an island in a meandered body of water, navigable or nonnavigable, in continuous existence since the date of admission of the State into the Union, and omitted from the original survey, remains public land of the United States. As such the island is subject to survey.

On July 29, 1985, BLM's Division of Cadastral Survey approved special instructions to provide for the examination and conditional survey of the island designated as Tract 37, "for the purpose of determining ownership or resolving possible trespass on Federally owned land." The scope of the examination, according to the instructions, was to determine whether the island "existed as a well-defined body of land, separate and distinct from the mainland, and above the ordinary high water mark on January 26, 1837, when Michigan entered the Union, and at all subsequent dates."

BLM's survey was completed on April 25, 1986. The field notes of the survey describe the island as consisting of sandy loam that rises gradually from all sides to a height of 15 feet above the normal lake level. It is surrounded by clear channels of water; the nearest mainland is west approximately 6 chains (396 feet) across a channel that reaches a depth of 5 to 7 feet. The level of the lake at the time of survey was 1 foot above normal lake level. The 1850 resurvey records reflect observations upon the island made during the meandering of the west shore of the lake. The surveyors found timber ranging in size from 4 to 29 inches in diameter, the largest being white pine. A similar white pine 28 inches in diameter on the adjacent shore line was bored and determined to be more than 85 years old. Stumps measuring 2-1/2 to 3 feet in diameter were found; however they were too decayed to provide an accurate count. The field notes concluded:

In consideration of the islands' [sic] characteristics, similar in all respects to the opposing surveyed land, the size and age of timber grown thereon, and the elevation above the lake level, it was determined that the island was in existence in 1839 when the township was subdivided, in 1837 when the State of Michigan was admitted into the Union and at all subsequent dates and is public land of the United States.

On May 2, 1986, the plat representing the survey of Tract 37 was officially accepted by BLM. BLM published a notice of the filing of the plat on May 22, 1986, in the Federal Register. See 51 FR 18845 (May 22, 1986). The notice read in part:

4. The present water level of the lake compares favorably with that of the original meander line, therefore, the elevation and upland character of the island along with the depth and width of the channel between the upland and the island are considered evidence that the island did exist in 1837, the year Michigan was admitted into the Union.

5. Tract 37 is more than 50% upland in character within the purview of the Act of September 28, 1850 (9 Stat. 519). Therefore, the island is held to be public land.

The notice stated that the island would "not be subject to application, petition, location, or selection under any public [land] law" until June 30, 1986, and that anyone interested in protesting the determination that the island is public land of the United States "must present valid proof showing that the island did not exist at the time of statehood or that it was attached to the mainland at the time of the original survey" before June 30. Inquiries concerning Color of Title Act claims were to be filed with BLM after that date. ^{1/}

Interested parties seeking to protest BLM's determination that Tract 37 was public land of the United States were directed to file such protest by June 30.

Appellants filed a protest with BLM on November 3, 1986. ^{2/} It is the January 7, 1987, BLM decision dismissing the protest from which the Dekkers appeal.

BLM's January 7, 1987, decision dismissing appellants' protest states:

A well-defined body of land in a meandered body of nonnavigable water is not a part of the bed of the body of water. The bed of a body of water is land covered by water. A body of land surrounded by water but never covered by it, is not part of the bed and could not have been included with a patent to riparian lots as an incident of riparian rights to the bed.

(Decision at 1-2). The decision states that it is a "long-standing policy of the Department," set forth in the headnote of Emma S. Peterson, 39 L.D. 566 (1911), that

[t]he United States has authority to survey and dispose of an island lying between the meander line and thread of a stream, navigable or nonnavigable, omitted from survey at the time the public land surveys were extended over the township, where it clearly appears that at the time of the township survey the island was a well-defined body of public land left unsurveyed.

In their statement of reasons (SOR), appellants submit they are the successors-in-interest to Government lots 1 and 4 adjoining Island Lake, which were patented by the United States in the late 1800's. Their principal contention on appeal is that Island Lake has always been a non-navigable body of water and that under prevailing case law, title to the island passed from the United States incidental to the transfer of lots 1 and 4 into non-Federal ownership. Appellants contend that the BLM decision

^{1/} See 43 U.S.C. § 1068 (1982); 43 CFR Part 2540.

^{2/} BLM accepted appellants' protest as timely filed.

is not in accord with the decisions of the United States Supreme Court and the law of the State of Michigan which, appellants assert, is controlling in the instant case. Quoting the Supreme Court's decision in Hardin v. Jordan, 140 U.S. 371 (1891), the appeal states: "[G]rants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie" (SOR at 2). Appellants state that Michigan follows the common law, which, they assert, provides that title to the bed under a non-navigable stream or lake passes under the patents of the adjoining lots. Appellants further argue: "[I]n Michigan, title to islands 'is ordinarily vested in the owner of the bed of water out of which they arise.' Tennant v. Recreation Development Corp., 72 Mich. App. 183, 186 (1976)" (SOR at 3).

Among other authorities, appellants rely upon the Michigan Supreme Court decision in Butler v. Grand Rapids & Indiana Railroad Co. 85 Mich. 246, 48 N.W. 569 (1891), aff'd, Grand Rapids & Indiana R'd Co. v. Butler, 159 U.S. 87 (1895). Appellants cite the following language from the decision of the Michigan Supreme Court:

[A] grantee of land bounded in the deed of conveyance by a stream takes title to the land under the water to the center or middle thread of the stream, in the absence of an expressed reservation. This applies to grants by the United States government as well as to grants by individuals.

Butler v. Grand Rapids & Indiana Railroad Co., 85 Mich. at 255, 48 N.W. at 571. Appellants also cite the court's decision in Bourgeois v. United States, 545 F.2d 727 (Ct. Cl. 1977), wherein the United States Court of Claims held that where the United States granted shoreland along non-navigable Michigan waters without expressly reserving title to offshore islands, title to those islands pass to the shore owners according to Michigan law. Appellants conclude that Federal common law dictates that grants of shoreland by the United States must be construed according to the law of the state in which the land lies, and therefore, according to Michigan law, title to this small unsurveyed island, in a non-navigable lake, ^{3/} passed to them through their predecessors-in-interest under the original patents for the adjoining lots.

[1] Since Emma S. Peterson, supra, this Department has consistently held that an unsurveyed island, whether located in navigable or non-navigable waters, remains public domain, does not pass with the bed under the water to a state upon statehood or convey with a grant of riparian land, and may be surveyed and disposed of by the United States. Manual of Instructions for the Survey of the Public Lands of the United States § 233 (1930); Status of Islands in the Arkansas River and Other Streams in Oklahoma Withdrawn from Settlement and Entry Because Within a Petroleum

^{3/} No determination of the navigability of Island Lake was made by BLM. As noted infra, such a determination is irrelevant to the issue of whether an island omitted from a survey remains public domain.

Reserve, 54 I.D. 222, 224 (1933); Manual of Instructions for the Survey of the Public Lands of the United States § 233 (1947); Northern Pacific Railway Co., 62 I.D. 401, 406 (1955); Manual of Instructions for the Survey of the Public Lands of the United States § 3-122 (1973); R. A. Mikelson, 26 IBLA 1 (1976).

In addition to the Department's longstanding precedent, recent decisions of the Board in cases quite similar to the present appeal control the proper disposition of this case. In Olive Wheeler, 108 IBLA 296 (1989), the Board upheld BLM's dismissal of a protest of the survey of an island consisting of approximately 0.9 acres in Arbutus Lake, Grand Traverse County, Michigan. In Northern Michigan Exploration Co., 114 IBLA 177, ___ I.D. ___ (1990), the Board upheld BLM's survey of an island in Rennie Lake, also in Michigan. The principal cases relied upon by the Dekker's here, Butler and Bourgeois, *supra*, are distinguished in the foregoing Board decisions as follows:

Butler is easily distinguished because the evidence there "left it uncertain whether the so-called island was more than a 'low sand bar, covered a good part of the year with water.'" Scott v. Lattig, 227 U.S. 229, 244 (1913). The "conformation" involved in Butler contrasts vividly with the fast lands identified by BLM as Tract 37. 159 U.S. at 95.

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Bourgeois offers faint support for appellant's position because that case relied upon a theory of access to hold that "if the intent of the grantor is ambiguous and the Government grants shoreland along non-navigable waters, it also passes title to islands according to the law of the state in which the property is located." 545 F.2d at 731. Key to this decision by the U.S. Court of Claims was the notion that if the Government has not reserved an easement in any of the Federal patents of riparian upland, it would have absolutely no way to use an island in a non-navigable lake. No access existing in favor of the Government, title to the island should pass according to state law, the court reasons. Such a view, however, overlooks the Government's power to obtain access by eminent domain. Leo Sheep Co. v. United States, 440 U.S. 668, 680 (1979).

Northern Michigan Exploration Co., 114 IBLA at 186, ___ I.D. at ___. In Olive Wheeler, *supra*, we stated:

Appellant distinguishes cases holding islands in navigable waterways that are not mentioned in conveyances of shorelands [that] do not pass, citing Bourgeois v. United States, 545 F.2d 727 (Ct. Claims 1977), in which the court held that title to an island in Jewell Lake in Michigan passed with the bed of the lake to the owner of the shoreland who was a successor-in-interest to a government patent that was silent as to the island.

* * * * *

* * * [We are not persuaded by Bourgeois v. United States, supra, that there should be a different rule for nonnavigable waters. It is not the case, as the court in Bourgeois assumed, that such an island was not surveyed because neither the patentee nor the United States "cared much about who held title to the island," 545 F.2d at 731, but because the general instructions for conducting surveys in Michigan in 1839 and 1853 established practical limits on how much should be accomplished, probably because it was difficult and expensive to conduct surveys of islands. An island of less than an acre that rose to a height of 35 feet was presumably regarded as unsuitable for cultivation and omitted from the surveys in accordance with the general instructions. Because people wished to purchase such islands, instructions were later issued providing that they would be surveyed for this purpose if the prospective purchasers would bear the expense of the survey. [Footnotes omitted.]

Olive Wheeler, supra at 300-01.

The present existence of an island and the other facts in the record support BLM's conclusion that this tract was an island at the time Michigan became a State and at the time of the surveys of sec. 31, T. 27 N., R. 9 W. Considered as a whole, the record shows that Tract 37 was separated by water from the mainland at all relevant times. Therefore, under the Department precedents cited above, Tract 37 remains in the public domain.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Wm. Philip Horton
Chief Administrative Judge

I concur:

John H. Kelly
Administrative Judge

